CONSULTATION ON PROPOSALS FOR AN INTEGRATED FRAMEWORK OF ENVIRONMENTAL REGULATION

RESPONDENT INFORMATION FORM

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Organisation Name

UK Environmental Law Association

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Introduction to response

The UK Environmental Law Association (UKELA) is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring the effectiveness of the legal framework for environmental regulation in Scotland.

UKELA has recently published a report called "The State of UK Environmental Law in 2011-2012", the culmination of a two-year research programme ('the UKELA Report'). It finds that there is a lack of coherence, integration and transparency in UK environmental law today. Given the relevance of that work to the present proposals, this response, prepared by the Scottish Law working party of UKELA, comments specifically, but not exclusively, on the issues of legislative coherence (i.e. clarity and comprehensibility), integration (i.e. overlapping and interaction of different regimes) and transparency (i.e. accessibility).

Purpose of the proposal (section 2)

UKELA warmly welcomes the overall proposal to create an integrated framework for environmental regulation by SEPA, and strongly supports the objectives of legislative simplicity, coherence and consistency that underpin it. We wish to sound a note of caution, however. It is clear from the UKELA Report that the aims of legislative coherence, integration and transparency are not always compatible, and that improvements in integration, for instance, can sometimes be achieved only at the expense of coherence and transparency.

UKELA also supports the aims of efficiency, effectiveness and fairness, and hopes these too will be achieved by the proposals. These outcomes depend largely on how the proposals are implemented by SEPA, and are therefore less certain.

UKELA notes the Scottish Government's intention (paragraph 2.3.4) to simplify and update SEPA's range of purposes, objectives and general duties. We note too that this consultation contains nothing further about this intention, and consider that it would have been more appropriate to undertake this exercise first, i.e. to consult the public, decide what sort of environmental regulator SEPA should be, and set out a consolidated range of statutory purposes for it, before undertaking such a fundamental review of the main legislation it enforces. Judging by statements in the foreword and in section 2.2, decisions have already been taken about what sort of environmental regulator Scotland needs, so we wonder whether such a future consultation can be open-minded.

UKELA considers that the primary objective of an environmental regulator should be protection of the environment, and should be stated as such, and that all other objectives, including those listed at paragraph 2.2.2, should be balancing duties.

UKELA urges the Scottish Government, in reviewing SEPA's range of purposes, objectives and general duties, to consider including a range of overarching environmental principles in any new primary legislation, in the same way that the principle of sustainable development is already embedded in the Environment Act

1995 and more recent legislation. By this we mean other principles largely adopted from European Union (EU) environmental law, such as 'polluter pays', the precautionary principle etc. Although SEPA is already obliged to some degree to have regard to such principles when implementing EU law, incorporating them in domestic legislation would make this obligation more transparent, and increase the accessibility of the law for all concerned.

Particular consideration should perhaps be given to conferring on SEPA a general duty to consider not just the immediate environmental impacts of any given polluting activity, but the wider knock-on effects for the environment of how it regulates that activity, within the constraints of its obligations (for example) to ensure fair and consistent implementation of EU directives. Thus SEPA should be aware of and responsive to the overall environmental picture including transport, CO_2 emissions, resource conservation and other factors downstream or upstream of the regulated activity that also affect the environment, as well as taking account of the wider environmental ramifications of its potential regulatory actions at the site.

As set out in more detail below, UKELA considers the proposals relating to enforcement (section 3.5) on the whole more problematic than those relating to the permitting structure, common regulatory procedures etc., so we strongly urge the Scottish Government to consider phased implementation of the proposals in order to allow for further detailed development of and consultation on the proposals relating to enforcement.

<u>Proposed changes – introduction (section 3.1)</u>

The 4 main regimes of water, waste, pollution prevention and control (PPC) and radioactive substances together take up the overwhelming bulk of SEPA's regulatory effort, and affect the overwhelming majority of the people and organisations whose activities SEPA regulates, so it is entirely appropriate that the focus should be on these regimes. UKELA considers that appropriate consideration has been given to the potential for applying some of the changes to the other regimes SEPA enforces.

UKELA fully supports the introduction across the 4 main regimes of (a) a single structure for authorising activities at 3 different levels according to risk; (b) a single set of regulatory procedures covering the submission, advertisement, consideration and determination of applications; the service of notices; the variation, enforcement, suspension and revocation of authorisations; and the conduct of appeals; and (c) a single set of powers of entry and investigation. This will undoubtedly enhance the integration of the regimes affected, and it has the potential to enhance their coherence and transparency.

However, the fact that each of the 4 main regimes has its origin in or is heavily influenced by a discrete European directive or directives which it is meant to transpose into domestic law, and the fact that each of these directives imposes different procedural requirements, are likely to mean that intricate legislative drafting is required to accommodate faithfully all the different directive requirements into a single structure. This could mean, as stated above, that the coherence and transparency of the law overall suffer as a result of the integrating process. The UKELA Report, citing the example of the Environmental Permitting Regulations 2010

– the result of a similar integration exercise in England and Wales – suggests that "there is a limit to how much improvement of legislative quality can be achieved through intricate and connecting drafting alone. Considerations of coherence and transparency, and thus workability, must be balanced with those of administrative integration". UKELA would urge the Scottish Government to bear this caveat in mind.

Proposed changes – single permitting structure (section 3.2)

Q1 ***Do you foresee any difficulties in adopting the single permissioning framework set out above?***

The general approach of having 3 levels of authorisation is broadly welcomed. It has been seen to work well in the Water Environment (Controlled Activities) (Scotland) Regulations 2005 and 2011 ('CAR'), although there is some concern that the General Binding Rules (GBRs) under CAR are not being actively enforced. The statement at paragraph 4.2.4 that "SEPA will be actively regulating" across all tiers is welcome in this regard, but is somewhat contradicted by the statement at 3.2.12 that registrations (let alone GBRs) "would not normally be subject to ongoing active regulation". UKELA suspects that the latter is more likely to be the case, given the focus on risk-based regulation, but this needs to be clarified.

UKELA considers that GBRs should be set out in legislation, not "in rules developed by Scottish Ministers or SEPA", even "under a procedure set out in the legislation". The whole point of GBRs under CAR, and as proposed here for the integrated structure – albeit involving only radioactive substances, not waste or PPC – is that the operator would not be required to notify SEPA "in any way". The intentional absence of an interface between the operator and SEPA at this level (until there is a non-compliance) should imply that the operator has no need to refer to SEPA literature or search the SEPA website to find out what is required of him or her, but such would be the consequence of having the rules developed by SEPA or Scottish Ministers. An operator subject to GBRs should be able to find them on the legislation.gov.uk website or from any professional adviser without reference to SEPA at all. In other words, where no regulatory contact is expected, maximum legislative transparency is required.

Furthermore, UKELA considers that where rules are to have direct effect on any person, i.e. without the issue to that person of a document setting out or referring to those rules, the rules should be subject to proper parliamentary scrutiny, with appropriate publicity and consultation. New GBRs have been introduced into CAR on 3 occasions since 2005, demonstrating that it is not difficult for the Scottish Government to do this using secondary legislation, so there appears to be no good reason for adopting a different procedure for GBRs under the proposed structure.

At registration level, by contrast, the requirement to register the activity with SEPA immediately establishes a contact with SEPA that enables SEPA to direct the operator to its literature and website. This means that it would be easier for operators to find rules that are set out there, and therefore arguably more acceptable for such rules not to be in legislation but to be developed by Scottish Ministers or SEPA. However, UKELA emphasises the importance of a transparent, accountable,

statutory procedure, involving appropriate publicity and consultation, for developing and amending what will be legally binding requirements (attracting criminal/civil sanctions). Without this there will be a clear risk of a loss of legal certainty, with potential damage to the rule of law. It is not yet clear whether the rule-making procedure recently introduced into the PPC regime and described at 3.2.16 in relation to standard permit conditions can deliver the desired accountability or certainty.

These aspects apart, the only real difficulty that UKELA foresees in adopting the single structure is, as stated above, the possibility that the different EU directive requirements that apply to the 4 main regimes could end up requiring complex legislative drafting including references to particular provisions of those directives and/or the use of multiple schedules setting out particular rules for each of the 4 regimes. This would lead to problems of coherence or transparency, or possibly both.

Q2 ***Do you agree that SEPA should adopt this proportionate approach to determining where an activity sits in the new permissioning hierarchy?***

As stated above in relation to the General Binding Rules themselves, UKELA considers likewise that the types of activity that are subject to the various GBRs should not be set out in SEPA guidance, as proposed, but in the legislation (following the CAR model), for maximum transparency in the context of no contact with SEPA. The Scottish Government has demonstrated over the last 7 years not only that it is sufficiently flexible to propose new GBRs under CAR when the need arises, but also that the regulation-making parliamentary process is sufficiently efficient to make their introduction possible with such frequency.

At registration level the more flexible approach proposed (of setting out in SEPA guidance the generic types of activity subject to registration) seems more appropriate, but it would seem anomalous to do so if, as suggested at 3.2.12, the conditions of registration might themselves be set out in legislation. It would make for a more coherent and transparent structure if at each level, both the types of activities to be authorised and the conditions of authorisation were set out in the same place – so for GBRs, in legislation, and for registrations, in SEPA guidance (subject to the comments above about the legal certainty, transparency and accountability of the statutory procedures).

UKELA agrees that SEPA should adopt the proportionate approach for determining whether a specific activity applied for should be authorised at registration or permit level, depending on site-specific risks (as under CAR at present) and possibly operator-specific factors. The requirement by SEPA of a level of authorisation other than the normal one for that type of activity will need careful justification by SEPA in order to defend an appeal on the grounds of unfairness.

Proposed changes – simpler and more consistent procedures (section 3.3)

Q3 ***Are there any problems in the current procedures for the 4 Main Regimes which could be addressed in the new single regulatory procedure?***

1. UKELA agrees that a wider range of offences should be added to the list of relevant convictions that SEPA must consider before deciding that an applicant is fit and proper to hold a waste management licence, as discussed at paragraph 3.3.8. UKELA urges the Scottish Government to consider whether it might be appropriate to require applicants to disclose all unspent convictions to SEPA and give SEPA wide discretion to take them into account.

Also in this regard, CAR contains the concept of 'responsible person', and requires SEPA to grant a water use licence only if it is satisfied that the person nominated as responsible person "will secure compliance with the authorisation" (regulation 8(6)). It seems clear that this test does not set as high a threshold the test of 'fit and proper person' under waste management licensing, but it is not clear on what basis SEPA could ever be satisfied that a person would not secure compliance with licence conditions, such as would enable it to refuse to grant the licence.

Given the existence of these two different statutory tests of competence/fitness to hold a licence, UKELA urges the Scottish Government to clarify whether both tests would appear under the single regulatory procedure, and if so, to set out in the legislation the different criteria for each test.

2. CAR contains a form of 'third party appeal' provision (at regulation 16) giving those who made representations in response to the advertisement of an application for authorisation the opportunity, before final determination of the application by SEPA, to ask the Scottish Ministers to call in the application for their own determination. UKELA favours this type of provision because it provides the public with a form of access to environmental justice in accordance with the third pillar of the Aarhus Convention. The CAR provision in question allows qualifying members of the public to appeal to a higher authority against SEPA's proposed course of action without the need for expensive judicial review proceedings, as would be necessary in order to challenge SEPA's decision under the other 3 regimes. Unlike judicial review, this process allows third parties to challenge the merits of SEPA's proposed decision. The Public Participation Directive-inspired changes to the PPC regime in 2005, requiring SEPA to advertise its draft determination and inviting third parties to send comments back to SEPA, provide, in comparison, a much more limited internal review mechanism which does little to address the third-pillar requirements of the Aarhus Convention. UKELA therefore strongly urges the Scottish Government to adopt the CAR provision for all 4 regimes under the single regulatory procedure.

Unfortunately the criteria against which such a call-in request under CAR will be considered by Ministers can only be found in a ministerial policy statement. In order to improve legislative transparency, UKELA urges the Government to include these criteria in the legislation.

3. CAR regulation 52 makes provision for different effects on different types of notice

pending the consideration of an appeal against the notice. For example, a variation notice will be suspended during the consideration of an appeal against it. On the other hand, an enforcement notice will not be suspended during the consideration of an appeal against any requirement in it. UKELA considers there are potential problems with both of these provisions which could be addressed under the proposed single set of procedures.

A variation notice can contain variations to many conditions, and there are concerns that all variations may be suspended by the making of an appeal against a single variation. If some of the variations that are not specifically appealed require the operator to make substantive upgrades for environmental improvements, these improvements could be delayed by a dispute over a totally unrelated variation. UKELA therefore urges the Scottish Government to consider narrowing the effect of this provision under the new procedure, such that only the specific variations that are the subject of the appeal are suspended during the consideration of the appeal, allowing the other unchallenged variations to take effect.

An enforcement notice can likewise require costly remedial works by an operator, and there are concerns that such requirements continue to have effect and are enforceable by SEPA notwithstanding an appeal against them. Although UKELA considers it important that urgent remedial works should not be delayed by the lodging of tactical appeals, and considers it unlikely that SEPA would take further enforcement action if an appeal were lodged except in cases of serious risk of significant harm to the environment or human health, there is the potential here for unfairness. UKELA acknowledges that CAR Schedule 9 paragraph 4 already makes different provision for the periods within which different types of appeal need to be lodged, and that the period within which an appeal against an enforcement notice must be lodged is one of the shortest, at 21 days. In any event there is nothing to stop an operator lodging an appeal within 2 or 3 days of the service of the notice, but all the other timescales run from the date of lodging of the appeal, and there is no provision for any acceleration of the process subsequent to the lodging of the appeal. UKELA therefore urges the Scottish Government to consider making provision for a fast-track procedure for appeals against enforcement notices, in view of the potentially high stakes for both the operator and the environment.

4. Registrations are intended to be a simple form of authorisation that can be completed and issued online with little administrative effort and in short order – less than 30 days under CAR. To simplify administrative procedures for registration even further, UKELA suggests that variation of registrations (and consequent consolidation of the varied conditions in a single authorisation) should be dispensed with. Experience under CAR has shown that these are time-consuming processes which cannot be done online and for which SEPA consequently charges more than for a new online registration. UKELA therefore recommends that if the conditions of an existing registration need to be changed for any reason, SEPA simply issue a new authorisation and revoke the old one. This was SEPA's practice for many years with registrations under sections 7 and 10 of the Radioactive Substances Act 1993.

Proposed changes – flexible and joined-up permissions (section 3.4)

Q4 ***Are there any issues which you think SEPA should take into account when developing its approach to joined-up permits?***

Some operators may consider a single permit for all their sites or activities to be unwieldy, and may wish to have separate permits for their various activities or sites. UKELA therefore considers that joined-up permits should be optional for operators.

Q5 ***Do you agree that there is merit in introducing corporate or accredited permits for environmental activities? If not, why not?***

In relation to corporate permits, UKELA considers that SEPA as regulator should be aware of and even responsive to information about competing priorities for investment in improvement across a company's sites and activities, but that protection of the environment and public health remains SEPA's top priority, and that SEPA should not be co-opted into or involved in investment decisions that favour required environmental improvements at one site over equally important improvements at another site.

It is not clear why SEPA should give "formal recognition of the level of responsibility a company is taking for its own environmental management", nor how this would work. Is the intention that a company's voluntary commitments would, on inclusion in a corporate permit, become mandatory obligations that SEPA could then enforce? Such an effect would need to be made explicit in legislation and perhaps elaborated in guidance, to provide legal certainty and to be workable. If that is not the intention, then the only purpose for this "formal recognition" would appear to be presentational.

UKELA cannot therefore see any environmental benefit in introducing corporate permits, on the basis of the present proposals. At a practical level, corporate permits would tend to be large, complex documents, likely to require frequent modification.

Accredited permits appear to be intended to recognise a company's performance and as such are operator-specific, as opposed to site-specific in the way that permits generally are. Problems would arise most obviously if the site to which the permit specifically relates was sold to another operator and an application for transfer of the permit was made. The new operator may not be able to guarantee the same level of commitment to environmental management, so the permit would have to be re-written. Problems could also arise in a way less visible to SEPA if there was a change of management personnel within the company at the permitted site. It might therefore be more appropriate to leave the site permit as it is, with all conditions in place, but issue a 'waiver' to the accredited operator that temporarily suspends specific conditions of the permit for as long as a particular management team is in place at the site.

Proposed changes – enforcement (section 3.5)

Against a recent background of piecemeal introduction of different types of enforcement measures in different regulatory regimes in Scotland, giving the impression of experimentation, UKELA welcomes the proposal to introduce a single set of common enforcement measures for SEPA across the 4 main regimes.

However, there is a risk that the introduction of what have sometimes been referred to as 'civil sanctions' to punish what are currently considered criminal offences could lead to serious legislative incoherence and loss of transparency. Many of these sanctions have been introduced in England and Wales already, but there has not been enough time for any proper assessment of their effectiveness, and UKELA is also of the view that more consideration needs to be given to the distinctness of the criminal law in Scotland, in particular the special role of the Procurator Fiscal in deciding what cases should be prosecuted. There also seems to be a lack of detail around many of the proposals.

UKELA therefore urges the Scottish Government to develop more detailed proposals relating to enforcement and to consult stakeholders again on these.

Q6 ***Do you agree that SEPA should have the power to use fixed and discretionary direct financial penalties to address less significant offences? Do you think the amounts of £500 and £1,000 for fixed penalties and the cap of £40,000 for a discretionary penalty are set at the right level?***

UKELA agrees in principle that SEPA should have these powers, but subject to the following.

If, as proposed (paragraph 3.5.11), the financial penalties are subject to the civil standard of proof, non-payment is dealt with through the civil courts, and appeal is to the Scottish Ministers, it is difficult to see how the offences that are to be punishable by financial penalties can continue to be regarded as criminal in nature.

It is not clear if it is proposed that financial penalties should be offered to an offender as an alternative to criminal prosecution. If it is, that would create practical problems, especially when the complete discretion of the Procurator Fiscal on such matters is taken into account. If an operator presented with the conditional offer of a fixed penalty as an alternative to prosecution decided not to pay the fine and take their chances in the criminal courts, SEPA would then have to satisfy the criminal standard of proof by presenting more evidence to the Procurator Fiscal, who could then decide that it was not in the public interest to prosecute. Would SEPA then be able to require payment of the fixed penalty? UKELA considers that the answer to that question is no, and that it is only the Procurator Fiscal who is capable of making a conditional offer of a fixed penalty as an alternative to prosecution, because only s/he knows with certainty that the refusal of the offer will result in prosecution.

UKELA therefore suggests that consideration be given to clarifying through the legislation that specified offences (the less significant ones, such as those mentioned in paragraphs 3.5.7 and 3.5.9) will cease to be criminal in nature, and from a single

fixed date be administrative in nature, attracting only administrative penalties. This would provide transparency, clarity and certainty.

A further option might be to make *all* the so-called 'technical' offences (such as carrying on a controlled activity under CAR without an authorisation) administrative in nature from a specified date, and thereafter preserve criminal prosecution exclusively for cases where significant environmental harm is caused by an intentional act, wilful recklessness or wilful neglect, in other words where *mens rea* can be adduced. In this connection UKELA welcomes the proposal at paragraph 3.5.26 to introduce a specific offence along these lines.

This would fundamentally alter the way in which SEPA deals with most environmental offences, leading to potentially significant efficiency savings, and would address the concerns of many who consider most environmental offences not to be 'real' criminal offences and that criminal prosecution is in most environmental cases a sledgehammer to crack a nut.

Under this further option, there might be cases where an administrative (or technical) offence (such as a breach of a licence condition) leads to significant environmental harm sufficient to constitute a criminal offence, depending on the evidence available and other circumstances. If however the Procurator Fiscal was not satisfied that there was sufficient evidence of *mens rea*, or that prosecution was in the public interest, or if the Crown failed to establish *mens rea* at trial, SEPA could still revert to direct enforcement measures, including a fixed or discretionary penalty, in relation to the administrative offence, with a right of appeal to Scottish Ministers – although the latter may raise questions of compatibility with the European Convention on Human Rights. There could be explicit provision to block administrative action by SEPA in the event that a criminal conviction is secured.

UKELA considers that the offences that attract fixed penalties should be distinguished clearly in the legislation from those that attract discretionary penalties, for purposes of increased legal certainty and transparency.

Consideration could be given to higher fixed penalties for repeat offences, say a doubling of the first fixed penalty after the third offence.

The amounts proposed for fixed penalties and for the cap on discretionary penalties seem fair and reasonable. Using the word 'discretionary' implies that SEPA will use its judgement and select an amount that it considers appropriate. UKELA considers that these fines should not be based entirely on SEPA's discretion, but on a transparent scoring system using the criteria listed in paragraph 3.5.8 – which should itself be subject to public consultation – and that it would be more appropriate to refer to them as 'variable' penalties. This would bring some much needed consistency to the imposition of financial penalties on environmental offenders.

Q7 ***Do you agree that SEPA should be given the power to accept enforcement undertakings in a greater range of circumstances? Do you agree that they should be limited to ensuring environmental restoration?***

It is perhaps ironic that enforcement undertakings have been introduced to SEPA's armoury for the first time under the Reservoirs (Scotland) Act 2011, which relates to public safety and has little to do with protection of the environment. Also it is noted that most enforcement undertakings accepted by the Environment Agency relate to offences against producer responsibility, where environmental restoration is not an option. It therefore remains to be seen whether enforcement undertakings can be an effective tool either for improving operator compliance with environmental licences – the primary purpose in UKELA's view of any enforcement mechanism – or for delivering environmental improvements – their secondary purpose in our view.

There are also similar issues to those described above for financial penalties around the distinction and the cross-over between criminal and administrative sanctions, and the completely separate and determinative role of the Procurator Fiscal in relation to criminal prosecution.

Until these details have been debated further and resolved, and until there is some empirical evidence of the effectiveness of enforcement undertakings in improving operator compliance, UKELA considers that it would be premature to extend the experiment in the 2011 Act into the 4 main regimes.

Q8 ***Do you agree that SEPA should be able to require non-compliant operators to publicise the damage they have caused the action they are taking to put things right? Should this power also be available to the courts?***

UKELA agrees that for certain operators, the threat of adverse publicity can be a very effective punishment with high deterrent value. It seems likely, however, that requiring the operator to carry out the publicity will lead to arguments with SEPA over the accuracy or adequate distribution of the publicity material, so it may be more efficient for SEPA to produce and disseminate the publicity material on the basis of standard guidance, and to require the operator to reimburse SEPA's costs in doing so. If the job were given to SEPA, there would be no need to give the proposed power to the courts.

Q9 ***Do you think that the direct measures set out above should be applied to the 4 Main Regimes and to the other regimes set out in paragraph 3.5.21? Would it be useful for the direct measures to be available to SEPA in relation to other regulatory regimes for which it has responsibility?***

Yes and yes, after careful consideration in relation to each regime.

Q10 ***Is there a need for any additional safeguards?***

Detailed rules of procedure for use of civil sanctions, guidance to SEPA on how to

choose between sanctions or combine them, and clarification on important issues such as standard of proof and appeals are some of the details that, based on the English experience, UKELA considers would need to be consulted upon and settled before stakeholders can feel comfortable with a new regime of civil sanctions operated by SEPA.

Q11 ***Do you agree that the existing powers relating to remediation and compensation orders should be extended as set out above? Do you think that we should require the courts to have regard to financial benefit when setting fines?***

Yes and yes.

Q12 ***Do you agree that SEPA should be able to recover the costs which it incurs in investigating and enforcing environmental legislation, up to the point at which it imposes a direct measure or refers a case to the Procurator Fiscal for prosecution?***

Yes.

Delivery (section 4)

Q13 ***Do you agree that the new integrated permissioning framework, supported by a more strategic, flexible enforcement toolkit and a targeted approach to regulation, will provide more effective protection of the environment and human health?***

UKELA supports the overall approach described in this section.

We anticipate that the integrated permitting structure and single set of regulatory procedures will over time improve understanding of environmental law not only by operators but also by the general public and within SEPA, especially if integration can be delivered without any loss of legislative transparency or coherence. If this can be achieved, the improved understanding should free up significant time for both SEPA and operator staff, and allow re-allocation of that time to identifying genuine environmental risks and effecting positive environmental outcomes. We hope that some of our suggestions, aimed at improving transparency and coherence, will be taken on board, and we would be very happy to clarify or discuss any of them further if necessary.

Whilst supporting the general principle of increasing the range of enforcement measures available to SEPA beyond what exists at present, UKELA has significant concerns about some of the individual proposals and would welcome the opportunity to take part in further consultations or discussions to flesh out the detail and overcome these concerns.